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October 18, 2002

To: Members of the Huntington Beach City Council

From: Teresa Henry, California Coastal Commission, Long Beach District Manager
Steve Rynas, California Coastal Commission, Orange County Coastal Programs Supervisor
Janna Shackeroff, California Coastal Commission, Water Quality Unit

RE: Water Quality issues in the Parkside Estates EIR (97-2)

Introduction

California Coastal Commission staff appreciates the opportunity to provide comments to the Huntington Beach City Council about Parkside Estates (Shea Homes, Final EIR 97-2). In early September, the Coastal Commission water quality staff raised several major problem areas in the water quality analysis of the Final EIR, and we have had numerous discussions and correspondences with City staff regarding our concerns. Although the City has certified the EIR as adequate, we continue to maintain that the water quality analyses in the Parkside Estates EIR have significant problems.

This letter outlines the key water quality issues that remain.

- A. Discussion of whether State and Federal Water Quality Requirements, "by definition, preclude a project from further degrading water quality."¹

Coastal Commission and City staffs have been discussing the merits of the Rivertech Inc. water quality reports (1998 and 2002), as well as their role in the water quality discussions of the EIR. City staff stated: "These reports were not used to support the EIR's findings of insignificant impact. The April 1998 Draft EIR concluded that water quality impacts of the project would be less than significant because the project would be required, per Drainage/Hydrology Mitigation Measures 2 and 3, to comply with federal and state water quality requirements.... In other words, the NPDES and WQMP standards/requirements, by definition, preclude a project from further degrading water quality...."²

Though City staff maintains compliance with NPDES and CWA requirements will prevent the project from degrading water quality, the staff does not acknowledge the limitations of these requirements. The requirements of the Clean Water Act and its

¹ From Memorandum from Mary Beth Broeren to Huntington Beach Planning Commission, September 24, 2002, regarding water quality issues raised by California Coastal Commission staff.

² From Memorandum from Mary Beth Broeren to Huntington Beach Planning Commission, September 24, 2002, regarding water quality issues raised by California Coastal Commission staff.

state law analogue do not necessarily preclude a development from causing some degradation of water quality.

Provisions in the Clean Water Act (CWA) do protect against degradation of water quality, but certain exceptions to the anti-degradation rules do exist. CWA Section 303 (Water Quality Standards and Implementation Plans) establishes the anti-degradation policy, which generally requires state water quality standards to "be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation."³ However, the anti-degradation provisions of the CWA do not prevent all degradation.⁴ Thus, while a Water Quality Management Plan designed with respect to CWA requirements may be adequate to protect water quality, the provisions in the regulations do not necessarily preclude any further degradation. Moreover, the heart of the CWA's system for ensuring maintenance of adequate ambient water quality is the Total Maximum Daily Load ("TMDL") program,⁵ which has not yet been implemented in this area.

Far more advanced than the TMDL program is the permitting program under the CWA, known as the National Pollutant Discharge Elimination System ("NPDES") program, which incorporates information from the TMDL program. However, beyond their initial construction, residential subdivisions are not directly regulated by the NPDES program. Other than certain prohibitions on specific types of pollution, the Municipal Stormwater permits that will be issued under the NPDES program are the only state or federal water quality permits of which we are aware that will even *indirectly* apply to Parkside Estate's long-term management of water quality. Those municipal stormwater permits regulate runoff only as it is eventually discharged from a municipal storm sewer. Such discharges must be controlled to reduce the discharge of pollutants to the "maximum extent practicable" ("MEP"),⁶ but it is important to note that the MEP standard is a technology-based standard that does not necessarily preclude further degradation. In fact, the courts have specifically held that municipal stormwater permits *need not comply* with the mandates of CWA section 301(b)(1)(C) (requiring that, in addition to technology-based standards, there be achieved "any more stringent limitation, including those necessary to meet water quality standards").⁷ A development meeting the MEP standard can still, by definition, degrade water quality.

Therefore, CWA and its NPDES statutes do not preclude water quality impacts and it is still necessary to analyze and describe potential impacts, mitigation measures, and alternatives in an EIR document. EIRs routinely evaluate potential water quality impacts, suites of Best Management Practices, as well as the potential impacts of those

³ PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 705, 718, 114 S. Ct. 1900, 1906, 1912 (1994), citing 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. §§ 131.6 and 131.12 (1993).

⁴ See, e.g., 40 C.F.R. § 131.12(a)(1) ("... the level of water quality *necessary to protect the existing uses* shall be maintained. . ." (emphasis added)) and § 131.12(a)(2) (providing a means by which states may allow some amount of degradation).

⁵ See 33 U.S.C. § 1313(d).

⁶ 33 U.S.C. § 1342(p)(3)(B).

⁷ Defenders of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999); 33 U.S.C. § 1311(b)(1)(C).

BMPs; and EIRs engage in this discussion in addition to recognizing the project will eventually be subject to other state and federal requirements.

The Lead Agency has the responsibility of ensuring the EIR evaluates impacts and describes alternatives to avoid impacts caused by the development. Parkside Estates EIR cannot simply rely on Mitigation Measures 2 and 3, which recognize the applicable state and federal water quality regulations, without presenting a sufficient analysis of project impacts to water quality. In our analysis,⁸ the April 1998 Draft did not sufficiently address potential impacts to Huntington Harbor, Bolsa Chica Reserve, and other receiving waters. Moreover, the April 1998 Draft did not sufficiently discuss potential site design, source control, and structural treatment Best Management Practices that might be employed by this development.

The Rivertech Reports (1998 and 2002) contained the most substantive discussion of water quality in the EIR, and the conclusions (as we will discuss in following sections) were cited extensively in the Response to Comments. Yet, as demonstrated in our September 9th letter, the Rivertech 1998 and 2002 reports contain fundamental flaws that invalidate their conclusions.

- B. Given the problem areas in the Rivertech Reports, and the prominence with which they appear in the Response to Comments, we continue to contend that there are serious problems with the water quality analysis in this project.

The 1998 and 2002 Rivertech Reports contain fundamental flaws in their analysis of the abilities of proposed Best Management Practices (namely, CDS Units). Namely, those conclusions include the statements repeated in the RTC: "*as a result of the project, the mitigated pollutant loads to the Slater Pump Station forebay will be less than existing levels from the same area;*" and "*Based on Table 1 of the February 2002 Addendum report [by Rivertech, Inc.], it is predicted that the mitigated pollutant loads to Slater Channel after development would be less than existing levels by approximately 45%. The reductions in pollutant loads are possible by diverting and treating the first flush runoff generated not only within the planned Parkside Estates, but also the first flush runoff contributed by an existing 21.8 acre development located to the northwest.... Potential water quality impacts caused by the proposed development will be mitigated to a level of insignificance by first flush stormwater diversion and treatment.*"⁹

As described in our September 9, 2002 letter to the City of Huntington Beach,¹⁰ the Rivertech Reports have flawed conclusions about post-construction water quality from this site for the following reasons:

⁸ For a partial list of comment letters raising water quality issues, please see the CCC's September 9 2002 letter RE Parkside Estates EIR.

⁹ Page 4-74 of July 2002 Final EIR for Parkside Estates.

¹⁰ Letter from Coastal Commission staff to Mary Beth Broeren, September 9, 2002, regarding Parkside Estates Final EIR (97-2); letter from CCC staff to Mary Beth Broeren, September 10, 2002; and letter from CCC staff to Huntington Beach Planning Commission, September 20, 2002.

The conclusions in the RTC that are based on the Rivertech, Inc. report's estimations of pollutant removal efficiencies need to be reconsidered. Even though it is an approximation, the 45% figure is most likely a significant over-estimation of the capabilities of BMPs and needs to be reconciled for the following reasons:

- i. While the number is an approximation, it grossly over-estimates the ability of BMPs or suites of BMPs to achieve pollutant reduction. Based on the analytical assumptions of the Rivertech Reports, to get a 45% reduction in pollutant loads over pre-development levels, this WQMP would have to achieve *at least* a 90% reduction in *all kinds* of urban runoff pollutants *at all times*.¹¹ This is simply not feasible given technology at this time and the dynamics of the real world environment, given that illicit discharges, accidental spills, and poorly maintained BMPs are a common reality.
- ii. It is difficult to make a quantitative or definitive conclusion about expected pollutant loads in urban runoff without a much more detailed investigation and data set. Potentially, water quality may be better than existing as a result of the development, but it must be realized that this development entails 50 acres of new residential development on a site that currently has no polluted runoff. Although the 20 acres of adjacent development will be treated with an end-of-the pipe structural BMP, it is questionable if this will compensate for the additional 50 acres of urban runoff.

The EIR's Response to Comments (RTC) regarding water quality focused heavily on findings in the Rivertech, Inc. reports of 1998 and 2002; as indicated above, we continue to believe there are serious problems with the analysis, and this remains an issue.

C. Potential water quality impacts to Huntington Harbor.

The Final EIR reasoned that because "mitigated pollutant loads to Slater Channel will be less than existing levels from the same area" and "pollutant loads to Slater Channel... would be less than existing levels by approximately 45 percent" (p. 4-74 of EIR), the development would not further degrade an already degraded condition.

Given that 1) Mitigation Measures 2 and 3 do not necessarily preclude further degradation to water quality, 2) the EIR does not propose any further standards by which the future Water Quality Management Plan must comply, and 3) the heavy reliance on the erroneous Rivertech conclusions in justifying the conclusion that there will be no impact to Huntington Harbor, we do not believe the analysis of impacts to Huntington Harbor is accurate.

D. Potential water quality impacts to the Bolsa Chica Reserve.

¹¹ Based on the assumptions in the Rivertech Reports (1998 and 2002).

We first raised the issue of water quality impacts to Bolsa Chica Reserve because the following passage from the EIR implies that there can be no water quality impacts from this development on the Bolsa Chica Wetlands. We believe this passage is contradictory to our assertion.

The EIR states on page 4-64:

"Additionally, according to the project biologist, the EGGW Channel has completely severed the surface and shallow subsurface hydrological and terrestrial connection between the project site and the Bolsa Chica Wetlands, and actions on the site would not have any measurable affect on the hydrology or water quality of the reserve or restoration areas. There are no tidal flows crossing, reaching or draining from the project site into any other natural area, nor are there any natural freshwater flows or nutrient transport systems entering or existing the site to or from adjacent natural areas." (From Page 4-64 of Final EIR)¹²

(emphasis added)

As we established in our September 9, 2002 letter, the above RTC statement is misleading. It is true that there is no direct connection of surface runoff or subsurface flows from the development directly to the Bolsa Chica wetlands, but it is entirely possible that runoff from the development can flow through the tidal gates and into the Bolsa Chica Reserve—once it has traveled down the EGGW Channel and into Outer Bolsa Bay.

The EIR should clearly depict the potential flow paths that runoff from this development might take. If, as a result of this development, pollutant loads or concentrations of pollutants are higher than existing levels, it does have the potential for impacting the Bolsa Chica Reserve once it has been introduced to the EGGW Channel.

Therefore, polluted runoff from Parkside Estates has the ability to reach some parts of the Bolsa Chica wetlands. We contend that just as the potential impacts to Huntington Harbor have not been addressed in this EIR, neither have the potential impacts to the Bolsa Chica wetlands.

For your consideration we have attached a chronology of the aforementioned series of correspondences between Coastal Commission staff and City of Huntington Beach staff.

Thank you for the opportunity to present these comments for your consideration. Given the importance of the coastal resources in this area and the value of protecting and possibly enhancing water quality, we felt it was important to highlight our remaining concerns. We look forward to continuing our work with the City on these issues.

¹² From Response to Comments page 4-64 (response to Coastal Commission staff letter dated July 31, 2001).

cc: Teresa Henry and Steve Rynas, California Coastal Commission
Mary Beth Broeren, City of Huntington Beach Planning Department

- Attachments:
1. Letter from Stephen Rynas (Coastal Commission Staff) to Mary Beth Broeren (City of Huntington Beach), with attached memorandum from Janna Shackeroff (Water Quality Unit) to Stephen Rynas, dated September 9, 2002
 2. Memorandum from Rivertech, Inc. to Mary Beth Broeren, dated September 10, 2002
 3. Letter from Stephen Rynas to Mary Beth Broeren, dated September 10, 2002
 4. Memorandum from Hasan Nouri, Rivertech Inc. to Mary Beth Broeren, dated September 17, 2002
 5. Letter from Mary Beth Broeren to Stephen Rynas, dated September 18, 2002
 6. Letter from Stephen Rynas to Huntington Beach Planning Commission, dated September 20, 2002
 7. Memorandum from Mary Beth Broeren to Huntington Beach Planning Commission, dated September 24, 2002